

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

STEVEN MCINNIS,	)	No. EDCV 08-1587-RC
	)	
Plaintiff,	)	
	)	OPINION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Steven McInnis filed a complaint on November 24, 2009, seeking review of the Commissioner's decision denying his application for disability benefits. On April 20, 2009, the Commissioner answered the complaint, and the parties filed a joint stipulation on July 2, 2009.

**BACKGROUND**

On January 30, 2006, plaintiff, who was born December 12, 1962, applied for disability benefits under the Supplemental Security Income program ("SSI") of Title XVI of the Social Security Act ("Act"), claiming an inability to work since September 14, 1999, due to back,

1 left shoulder and right thumb pain, an "exploding" ulcer, a hole in  
2 his intestine, and three "fractured toes that will not heal."  
3 Certified Administrative Record ("A.R.") 77-80, 90, 101. The  
4 plaintiff's application was initially denied on May, 2006, and was  
5 denied again on February 8, 2007, following reconsideration. A.R. 41-  
6 52. The plaintiff then requested an administrative hearing, which was  
7 held before Administrative Law Judge Jay E. Levine ("the ALJ") on  
8 January 9, 2008. A.R. 18-38, 53. On February 28, 2008, the ALJ  
9 issued a decision finding plaintiff is not disabled. A.R. 5-17. The  
10 plaintiff appealed this decision to the Appeals Council, which denied  
11 review on September 15, 2008. A.R. 1-4.

## 12 13 DISCUSSION

### 14 I

15 The Court, pursuant to 42 U.S.C. § 405(g), has the authority to  
16 review the Commissioner's decision denying plaintiff disability  
17 benefits to determine if his findings are supported by substantial  
18 evidence and whether the Commissioner used the proper legal standards  
19 in reaching his decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th  
20 Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009).  
21 "In determining whether the Commissioner's findings are supported by  
22 substantial evidence, [this Court] must review the administrative  
23 record as a whole, weighing both the evidence that supports and the  
24 evidence that detracts from the Commissioner's conclusion." Reddick  
25 v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Holohan v. Massanari,  
26 246 F.3d 1195, 1201 (9th Cir. 2001). "Where the evidence can  
27 reasonably support either affirming or reversing the decision, [this  
28 Court] may not substitute [its] judgment for that of the

1 Commissioner." Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007),  
2 cert. denied, 128 S. Ct. 1068 (2008); Vasquez, 572 F.3d at 591.

3  
4 The claimant is "disabled" for the purpose of receiving benefits  
5 under the Act if he is unable to engage in any substantial gainful  
6 activity due to an impairment which has lasted, or is expected to  
7 last, for a continuous period of at least twelve months. 42 U.S.C.  
8 § 1382c(a)(3)(A); 20 C.F.R. § 416.905(a). "The claimant bears the  
9 burden of establishing a prima facie case of disability." Roberts v.  
10 Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied, 517 U.S. 1122  
11 (1996); Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996).

12  
13 The Commissioner has promulgated regulations establishing a five-  
14 step sequential evaluation process for the ALJ to follow in a  
15 disability case. 20 C.F.R. § 416.920. In the **First Step**, the ALJ  
16 must determine whether the claimant is currently engaged in  
17 substantial gainful activity. 20 C.F.R. § 416.920(b). If not, in the  
18 **Second Step**, the ALJ must determine whether the claimant has a severe  
19 impairment or combination of impairments significantly limiting him  
20 from performing basic work activities. 20 C.F.R. § 416.920(c). If  
21 so, in the **Third Step**, the ALJ must determine whether the claimant has  
22 an impairment or combination of impairments that meets or equals the  
23 requirements of the Listing of Impairments ("Listing"), 20 C.F.R.  
24 § 404, Subpart P, App. 1. 20 C.F.R. § 416.920(d). If not, in the  
25 **Fourth Step**, the ALJ must determine whether the claimant has  
26 sufficient residual functional capacity despite the impairment or  
27 various limitations to perform his past work. 20 C.F.R. § 416.920(f).  
28 If not, in **Step Five**, the burden shifts to the Commissioner to show

1 the claimant can perform other work that exists in significant numbers  
2 in the national economy. 20 C.F.R. § 416.920(g). Moreover, where  
3 there is evidence of a mental impairment that may prevent a claimant  
4 from working, the Commissioner has supplemented the five-step  
5 sequential evaluation process with additional regulations addressing  
6 mental impairments.<sup>1</sup> Maier v. Comm'r of the Soc. Sec. Admin., 154  
7 F.3d 913, 914-15 (9th Cir. 1998) (per curiam).

8  
9 Applying the five-step sequential evaluation process, the ALJ  
10 found plaintiff has not engaged in substantial gainful activity since  
11 his application date. (Step One). The ALJ then found plaintiff has  
12 the following severe impairments: "degenerative disc disease of the  
13 cervical spine, a learning disorder in language and reading, status  
14 post[-]fractured foot and left thumb" (Step Two); however, he does not  
15 have an impairment or combination of impairments that meets or equals  
16 a Listing. (Step Three). The ALJ next determined plaintiff is unable

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18 <sup>1</sup> First, the ALJ must determine the presence or absence of  
19 certain medical findings relevant to the ability to work. 20  
20 C.F.R. § 416.920a(b)(1). Second, when the claimant establishes  
21 these medical findings, the ALJ must rate the degree of  
22 functional loss resulting from the impairment by considering four  
23 areas of function: (a) activities of daily living; (b) social  
24 functioning; (c) concentration, persistence, or pace; and (d)  
25 episodes of decompensation. 20 C.F.R. § 416.920a(c)(2-4).  
26 Third, after rating the degree of loss, the ALJ must determine  
27 whether the claimant has a severe mental impairment. 20 C.F.R.  
28 § 416.920a(d). Fourth, when a mental impairment is found to be  
severe, the ALJ must determine if it meets or equals a Listing.  
20 C.F.R. § 416.920a(d)(2). Finally, if a Listing is not met,  
the ALJ must then perform a residual functional capacity  
assessment, and the ALJ's decision "must incorporate the  
pertinent findings and conclusions" regarding plaintiff's mental  
impairment, including "a specific finding as to the degree of  
limitation in each of the functional areas described in  
[§ 416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

1 to perform his past relevant work as a combat signaler in the military  
2 or a warehouse worker. (Step Four). Finally, the ALJ determined  
3 plaintiff can perform a significant number of jobs in the national  
4 economy; therefore, he is not disabled. (Step Five).

## 6 II

7 A claimant's residual functional capacity ("RFC") is what he can  
8 still do despite his physical, mental, nonexertional, and other  
9 limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001);  
10 see also Valentine v. Comm'r, Soc. Sec. Admin., 574 F.3d 685, 689 (9th  
11 Cir. 2009) (RFC is "a summary of what the claimant is capable of doing  
12 (for example, how much weight he can lift)."). Here, the ALJ found  
13 plaintiff has the RFC:

14  
15 to perform sedentary work<sup>2</sup> . . . except he cannot work at  
16 unprotected heights or around dangerous machinery. He  
17 cannot work on uneven ground or with vibrating tools/  
18 equipment. He can occasionally climb, balance, stoop,  
19 kneel, crouch and crawl. He cannot do forceful gripping or  
20 grasping and can occasionally lift above shoulder level.  
21 Mentally, the [plaintiff] can perform entry level work.

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24 <sup>2</sup> "Sedentary work involves lifting no more than 10 pounds  
25 at a time and occasionally lifting or carrying articles like  
26 docket files, ledgers, and small tools. Although a sedentary job  
27 is defined as one which involves sitting, a certain amount of  
28 walking and standing is often necessary in carrying out job  
duties. Jobs are sedentary if walking and standing are required  
occasionally and other sedentary criteria are met." 20 C.F.R.  
§ 416.967(a).

1 A.R. 11 (footnote added). However, plaintiff contends the ALJ's RFC  
 2 determination is not supported by substantial evidence because the ALJ  
 3 failed to properly consider the opinions of examining psychologist  
 4 David C. Anderson, Ph.D., nonexamining physician Ann Dew, D.O., and  
 5 treating physical therapist Jennifer Spurgeon, MFT.<sup>3</sup>

6  
 7 **A. Dr. Anderson:**

8 "[T]he ALJ may only reject . . . [an] examining physician's  
 9 uncontradicted medical opinion based on 'clear and convincing  
 10 reasons[,]'" Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155,  
 11 1164 (9th Cir. 2008) (citation omitted); Widmark v. Barnhart, 454 F.3d  
 12 1063, 1066 (9th Cir. 2006), and "[e]ven if contradicted by another  
 13 doctor, the opinion of an examining doctor can be rejected only for  
 14 specific and legitimate reasons that are supported by substantial  
 15 evidence in the record." Regennitter v. Comm'r of the Soc. Sec.  
 16 Admin., 166 F.3d 1294, 1298-99 (9th Cir. 1999); Ryan v. Comm'r of Soc.  
 17 Sec., 528 F.3d 1194, 1198 (9th Cir. 2008).

18  
 19 In August of 2006, plaintiff underwent psychological testing at  
 20 Loma Linda Veteran's Administration Medical Center, where, based on  
 21

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22 <sup>3</sup> Although plaintiff's attorney categorizes Drs. Anderson  
 23 and Dew as treating physicians, see Jt. Stip. at 4:1-22, 11:13-  
 24 27, that is not so. Rather, the medical records demonstrate Dr.  
 25 Anderson saw plaintiff one time regarding a possible learning  
 26 disability, A.R. 325, and Dr. Dew simply reviewed plaintiff's  
 27 chart and offered an opinion, see A.R. 361 (Plaintiff "is not  
 28 here for physical examination, just chart review."); thus, Dr.  
 Anderson is an examining physician and Dr. Dew is a nonexamining  
 physician. In any event, even if Drs. Anderson and Dew are  
 considered to be treating physicians, the results would be the  
 same.

1 "assessment results indicating that [plaintiff's] Verbal Comprehension  
2 Index [("VCI") is in the Borderline range (5th percentile)[,] . . .  
3 [his] reading comprehension is in the 3rd percentile, [and] his  
4 spelling is in the 1st percentile[,]" Dr. Anderson concluded that  
5 plaintiff likely has a language-based learning disability. A.R. 324-  
6 30. Dr. Anderson explained that plaintiff's VCI score shows he has  
7 poor verbal comprehension when compared to his peers. A.R. 327.  
8 Further testing revealed: plaintiff's full scale IQ is 84, which is  
9 in the below-average range;<sup>4</sup> plaintiff has appropriate non-verbal  
10 reasoning ability when compared to his peers; and plaintiff's ability  
11 to hold and process information in short-term memory is in the average  
12 range. A.R. 327-28. With regard to the tests, Dr. Anderson  
13 explained:

14  
15 In making comparisons between [plaintiff's] cognitive  
16 abilities, his perceptual organization was significantly  
17 higher than his verbal comprehension.<sup>[5]</sup> This indicates

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18  
19 <sup>4</sup> Dr. Anderson found that the full scale IQ score "is not a  
20 valid measure of [plaintiff's] past and current intellectual  
21 functioning." A.R. 329.

22 <sup>5</sup> Upon testing plaintiff's basic academic skills, Dr.  
23 Anderson found:

24 On a task that required the [plaintiff] to read a  
25 series of single words, [plaintiff's] performance was  
26 in the Low range for his age group (5th percentile),  
27 with a grade equivalency in 5th grade. This indicates  
28 that his ability to read is low when compared to his  
peers, and is comparable to a student in the 5th grade.  
His performance in Sentence Comprehension was also in  
the low range for his age group (3rd percentile), with  
a grade equivalency at the 6th grade level. This  
indicates that the [plaintiff's] understanding of what

1 that [plaintiff] is much better at processing visually  
2 perceived material than he is with verbal information.  
3 Furthermore, [plaintiff's] working memory was better than  
4 his visual comprehension. This indicates that even though  
5 his mental processing ability is intact, he has difficulty  
6 processing verbal information and thinking with words.

7  
8 A.R. 328 (footnote added). Dr. Anderson recommended plaintiff would  
9 benefit from remedial reading courses. A.R. 329.

10  
11 Plaintiff complains that the ALJ did not specifically address his  
12 poor spelling when determining in Step Five that he can perform other  
13 work in the national economy. The Court disagrees. An ALJ need not  
14 set forth verbatim every statement a physician makes; rather, he need  
15 only discuss evidence that is significant and probative of a  
16 claimant's disability claim. Howard v. Barnhart, 341 F.3d 1006, 1012  
17 (9th Cir. 2003). Here, the ALJ accepted Dr. Anderson's opinions, and,  
18 based on those opinions, found plaintiff has a severe learning  
19 disorder in language and reading; however, plaintiff can perform entry  
20 level work. A.R. 10-11, 14-15. In making these findings, the ALJ

21  
22  
23 he has read is low when compared to his peers, and is  
24 comparable to a student in the 6th grade. [¶] . . .  
25 [¶] Finally, on a task that required him to spell  
26 verbally presented words, [plaintiff's] spelling was in  
27 the Lower Extreme range for his age (1st percentile),  
with a grade equivalency at the 3rd grade level. This  
indicates that his ability to spell is exceptionally  
low when compared to his peers, and is comparable to a  
student in the 3rd grade.

28 A.R. 328.

1 specifically noted plaintiff "was significantly below the percentile  
2 in reading, spelling and verbal comprehension." A.R. 14. However,  
3 the ALJ also found that plaintiff's "'severe' learning disorder . . .  
4 would not preclude the performance of entry level work" since the  
5 medical records "consistently showed no learning barriers, that the  
6 [plaintiff] was able to verbalize or demonstrate understanding of  
7 post-operative care and instructions," and plaintiff had good under-  
8 standing of the use and safety of medical equipment, medication and  
9 medical procedures. A.R. 14-15; see also A.R. 172, 185-87, 189, 195,  
10 213-14, 349-50. Thus, the ALJ properly assessed plaintiff's learning  
11 disability, and his findings are supported by substantial evidence in  
12 the record. See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir.  
13 2005) (Substantial evidence supports ALJ's determination that claimant  
14 has difficulty paying attention, concentrating, and organizing herself  
15 without getting overwhelmed where ALJ agreed with physician's  
16 assessment but concluded it would not affect claimant's ability to  
17 work since, despite these limitations, claimant was able to complete  
18 high school, obtain a college degree, finish a certified nurses' aide  
19 training program, and participate in military training).

20  
21 **B. Dr. Dew:**

22 On November 20, 2006, Dr. Dew reviewed plaintiff's chart and  
23 diagnosed him as having an unspecified finger injury, osteoarthritis,  
24 low back pain, and a basic learning disability. A.R. 360-62. Dr. Dew  
25 opined:

26  
27 It is unlikely that [plaintiff] will be able to return to  
28 general labor positions, his learning disability might be

1 remediated with proper instruction . . . so that he could do  
2 sedentary work[;] however, his dependence on pain medication  
3 for musculoskeletal complaints might interfere with his  
4 ability to concentrate.  
5

6 A.R. 362. The plaintiff contends the ALJ erred in rejecting Dr. Dew's  
7 opinion that plaintiff's pain medication might interfere with his  
8 ability to concentrate.<sup>6</sup> Jt. Stip. at 10:18-12:16, 13:15-21.  
9

10 The ALJ "may reject the opinion of a nonexamining physician by  
11 reference to specific evidence in the medical record." Sousa v.  
12 Callahan, 143 F.3d 1240, 1244 (9th Cir. 1998). Here, the ALJ  
13 disregarded Dr. Dew's opinion that plaintiff's "dependence on pain  
14 medication for musculoskeletal complaints might interfere with his  
15 ability to concentrate because the record specifically states his  
16 medications caused no excessive sleepiness or drowsiness." A.R. 15  
17 (citations omitted). This is a specific and legitimate reason for  
18 rejecting Dr. Dew's speculation, and the ALJ's rationale is supported  
19 by substantial evidence in the record. See, e.g., A.R. 359; Batson v.  
20 Comm'r of the Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004);  
21 Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir.  
22 1999).

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25  
26 <sup>6</sup> To the extent plaintiff contends the ALJ erred in failing  
27 to consider side effects from his medication, plaintiff's claim  
28 is specious since he has not identified any side effects he  
experienced. See Jt. Stip. at 10:18-12:16, 13:15-21; Greger v.  
Barnhart, 464 F.3d 968, 973 (9th Cir. 2006).

1           **C.     Physical Therapist:**

2           A physical therapist is not an acceptable medical source, 20  
3 C.F.R. § 416.913(a); nevertheless, an ALJ should consider such  
4 evidence, at a minimum, as lay testimony which is qualified evidence.  
5 20 C.F.R. § 416.913(d)(1); Sprague v. Bowen, 812 F.2d 1226, 1231-32  
6 (9th Cir. 1987).

7  
8           Physical therapist Jennifer Spurgeon, MPT, examined plaintiff on  
9 November 22, 2006, and noted, among other things, that plaintiff had  
10 an antalgic gait<sup>7</sup> and was moderately independent without an assistive  
11 device and with a cane.<sup>8</sup> A.R. 357. Ms. Spurgeon started plaintiff on  
12 a course of physical therapy, A.R. 356-58, and plaintiff subsequently  
13 attended four physical therapy sessions with Ms. Spurgeon. A.R. 443-  
14 45. When he was discharged from physical therapy on January 25, 2007,  
15 Ms. Spurgeon opined that plaintiff's goals were partially achieved and  
16 he "demonstrated no significant antalgia or mobility limitations.  
17 . . ." A.R. 444. Nevertheless, plaintiff contends the ALJ did not  
18 properly address Ms. Spurgeon's initial comments about his gait and  
19 use of a cane. Again, the Court disagrees.

20  
21           Here, the ALJ specifically noted that plaintiff has, at times,  
22 been found to have an antalgic gait. A.R. 12. The ALJ also noted

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23  
24           <sup>7</sup> An antalgic gait is "a limp adopted so as to avoid pain  
25 on weight-bearing structures (as in hip injuries), characterized  
26 by a very short stance phase." Dorland's Illustrated Medical  
Dictionary, 721 (29th ed. 2000).

27           <sup>8</sup> Plaintiff mischaracterizes Ms. Spurgeon's notation as  
28 indicating plaintiff "requires the use of a cane." Jt. Stip. at  
13:25-27.

1 that plaintiff has been prescribed a cane, id.; see also A.R. 192, but  
2 opined "its need seems questionable in light of no significant  
3 antalgia or mobility limitations. . . ." A.R. 12. Significantly, in  
4 reaching this conclusion, the ALJ cited Ms. Spurgeon's opinion that  
5 upon discharge from physical therapy plaintiff "demonstrated no  
6 significant antalgia or mobility limitations." A.R. 444. Thus, it is  
7 clear that the ALJ properly considered the treating physical  
8 therapist's opinions.

9  
10 Moreover, the ALJ also found other evidence supports the finding  
11 plaintiff does not need a cane, noting:

12  
13 [Plaintiff] . . . [is] . . . weight bearing, . . .  
14 ambulate[s] without difficulty and . . . ha[s] a steady  
15 gait. [His s]trength has been intact, sensation intact, and  
16 deep tendon reflexes intact. At the orthopedic consultative  
17 examination of April 2006, [plaintiff's] gait was normal and  
18 no assistive devices were used to ambulate. Examination of  
19 the [plaintiff's] feet revealed enlargement deformity of the  
20 right great toe. There was no evidence of swelling or  
21 tenderness. There was 50 percent restriction in range [of]  
22 motion of the right toe with no neurological deficits.

23  
24 A.R. 12 (citations omitted). The ALJ then concluded that a cane "is  
25 not medically necessary when [plaintiff is] sitting and performing  
26 sedentary work." Id. The ALJ has provided specific and legitimate  
27 reasons for finding plaintiff does not need a cane to ambulate, and  
28 these findings are supported by substantial evidence in the record.

1 A.R. 120-21, 178, 357, 367, 412, 444; Batson, 359 F.3d at 1195;  
 2 Morgan, 169 F.3d at 602.

### 3 4 III

5 At Step Five, the burden shifts to the Commissioner to show the  
 6 claimant can perform other jobs that exist in the national economy.  
 7 Bray v. Astrue, 554 F.3d 1219, 1222 (9th Cir. 2009); Hoopai v. Astrue,  
 8 499 F.3d 1071, 1074-75 (9th Cir. 2007). To meet this burden, the  
 9 Commissioner "must 'identify specific jobs existing in substantial  
 10 numbers in the national economy that [the] claimant can perform  
 11 despite her identified limitations.'" Meanel v. Apfel, 172 F.3d 1111,  
 12 1114 (9th Cir. 1999) (quoting Johnson v. Shalala, 60 F.3d 1428, 1432  
 13 (9th Cir. 1995)). There are two ways for the Commissioner to meet  
 14 this burden: "(1) by the testimony of a vocational expert, or (2) by  
 15 reference to the Medical Vocational Guidelines ["Grids"] at 20 C.F.R.  
 16 pt. 404, subpt. P, app. 2."<sup>9</sup> Tackett v. Apfel, 180 F.3d 1094, 1099  
 17 (9th Cir. 1999); Bray, 554 F.3d at 1223 n.4. However, "[w]hen [the  
 18 Grids] do not adequately take into account [a] claimant's abilities  
 19 and limitations, the Grids are to be used only as a framework, and a  
 20 vocational expert must be consulted." Thomas v. Barnhart, 278 F.3d

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21  
 22  
 23 <sup>9</sup> The Grids are guidelines setting forth "the types and  
 24 number of jobs that exist in the national economy for different  
 25 kinds of claimants. Each rule defines a vocational profile and  
 26 determines whether sufficient work exists in the national  
 27 economy. These rules represent the [Commissioner's]  
 28 determination, arrived at by taking administrative notice of  
 relevant information, that a given number of unskilled jobs exist  
 in the national economy that can be performed by persons with  
 each level of residual functional capacity." Chavez v. Dep't of  
 Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996)  
 (citations omitted).

1 947, 960 (9th Cir. 2002); Bray, 554 F.3d at 1223 n.4.

2  
3 Hypothetical questions posed to a vocational expert must consider  
4 all of the claimant's limitations, Valentine, 574 F.3d at 690; Thomas,  
5 278 F.3d at 956, and "[t]he ALJ's depiction of the claimant's  
6 disability must be accurate, detailed, and supported by the medical  
7 record." Tackett, 180 F.3d at 1101. "If a vocational expert's  
8 hypothetical does not reflect all the claimant's limitations, then the  
9 'expert's testimony has no evidentiary value to support a finding that  
10 the claimant can perform jobs in the national economy.'" Matthews v.  
11 Shalala, 10 F.3d 678, 681 (9th Cir. 1995) (quoting Delorme v.  
12 Sullivan, 924 F.2d 841, 850 (9th Cir. 1991)); Lewis v. Apfel, 236 F.3d  
13 503, 517 (9th Cir. 2001).

14  
15 Here, the ALJ asked vocational expert Sandra Fioretti the  
16 following hypothetical question:

17  
18 Assume a hypothetical individual [plaintiff's] age,  
19 education, prior work experience. Assume this person is  
20 restricted to a sedentary range of work. No work on  
21 dangerous machinery. No work [at] unprotected heights. No  
22 uneven ground. No vibration. No balancing. Occasional  
23 climbing, stooping, kneeling, crouching, crawling. No  
24 forceful gripping or grasping. Occasional lifting above  
25 shoulder level. And let's say entry level work. Is there  
26 work in the regional or national economy such a person could  
27 perform?

28 //

1 A.R. 35. The vocational expert responded that such a person could  
 2 perform work as an assembler in buttons and notions (Dictionary of  
 3 Occupational Titles ("DOT")<sup>10</sup> no. 734.687-018, a sorter of small  
 4 agricultural products such as nuts (DOT no. 521.687-086), and a charge  
 5 account clerk (DOT no. 205.367-014). A.R. 36. Based on this  
 6 testimony, the ALJ concluded plaintiff can perform a significant  
 7 number of jobs in the national economy. A.R. 16. However, plaintiff  
 8 contends the ALJ's hypothetical question to the vocational expert was  
 9 incomplete because the ALJ did not include plaintiff's need for a cane  
 10 to ambulate. Jt. Stip. at 17:1-18:7, 19:4-8. For the reasons  
 11 discussed above, the ALJ did not need to include this alleged  
 12 limitation in his hypothetical question to the vocational expert.  
 13 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001); Magallanes v.  
 14 Bowen, 881 F.2d 747, 756-57 (9th Cir. 1989).

15  
 16 Further, plaintiff contends the ALJ's Step Five determination is  
 17 not supported by substantial evidence because "it is very clear that  
 18 the Plaintiff is unable to perform the[] jobs" the vocational expert  
 19 identified given "writing demands that exceed the Plaintiff's  
 20 limitations." Jt. Stip. at 7:5-8:14, 10:5-13. There also is no merit  
 21 to this claim.

22  
 23 The jobs of assembler and sorter of agricultural products have  
 24 //  
 25 //

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26  
 27 <sup>10</sup> The DOT is the Commissioner's primary source of reliable  
 28 vocational information. Johnson, 60 F.3d at 1434 n.6; Terry v.  
Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990).

1 language development levels of 1<sup>11</sup> -- the lowest level -- which  
 2 requires the individual to "[p]rint simple sentences containing  
 3 subject, verb, and object, and series of numbers, names and  
 4 addresses." Dictionary of Occupational Titles at 351, 757, 1010-11.  
 5 Here, plaintiff completed high school, A.R. 21, 94, and his past  
 6 relevant work as a materials handler had a language development level  
 7 of 1. A.R. 23, 34-35; Dictionary of Occupational Titles at 949-50.  
 8 There is nothing in the record showing plaintiff is unable to perform  
 9 simple written tasks despite his learning disability and spelling at a  
 10 third-grade level.<sup>12</sup> A.R. 328-29. To the contrary, the California  
 11 content standards for third grade level written and oral language, see  
 12 California Parents for Equalization of Educ. Materials v. Noonan, 600  
 13 F. Supp. 2d 1088, 1097 (E.D. Cal. 2009) ("The Content Standards  
 14 describe what students should know and be able to do by the end of  
 15 each grade level."), suggest that, among other skills, a third grade  
 16 student should be able to "[s]pell correctly one-syllable words that  
 17 have blends, contractions, compounds, orthographic patterns (e.g., qu,

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19 <sup>11</sup> Among other features, the DOT sets forth guidelines  
 20 regarding the General Education Development ("GED") required to  
 21 perform various occupations. The GED guidelines are subdivided  
 22 into three categories - reasoning development, mathematical  
 23 development, and language development - that are rated on a scale  
 from 1 (lowest) to 6 (highest). U.S. Dep't of Labor, Dictionary  
of Occupational Titles, 1010-11 (4th ed. 1991).

24 <sup>12</sup> On the other hand, the job of charge account clerk has a  
 25 language development level of 3, which requires the ability to  
 26 "[w]rite reports and essays with proper format, punctuation,  
 27 spelling, and grammar, using all parts of speech." Dictionary of  
Occupational Titles at 174-75, 1011. This job would appear to be  
 28 beyond the limitations of plaintiff's learning disability.  
 Nevertheless, any error in this regard is harmless given the  
 other jobs plaintiff can perform. Tommasetti v. Astrue, 533 F.3d  
 1035, 1038 (9th Cir. 2008).

1 consonant doubling, changing the ending of a work from -y to -ies when  
2 forming the plural, and common homophones (e.g., hair-hare)," arrange  
3 words in alphabetical order, create a single paragraph, "[r]evise  
4 drafts to improve the coherence and logical progression of ideas by  
5 using an established rubric[,]" write narratives, "descriptions that  
6 use concrete sensory details to present and support unified  
7 impressions of people, places, things, or experiences[,]" and personal  
8 and formal letters, thank-you notes, and invitations, and  
9 "[u]nderstand and be able to use complete and correct declarative,  
10 interrogative, imperative, and exclamatory sentences in writing and  
11 speaking." See California State Board of Education, Content  
12 Standards, English Language Arts at pp. 18-19. (<http://www.cde.ca.gov/be/st/ss/documents/elacontentstnds.pdf> (last visited February 11,  
13 2010)). Thus, an ability to spell (or write) at the third grade level  
14 is not inconsistent with an ability to perform jobs requiring a  
15 language development level of 1, and the vocational expert's testimony  
16 provides substantial evidence to support the ALJ's Step Five  
17 determination.  
18

#### 19 20 ORDER

21 IT IS ORDERED that: (1) plaintiff's request for relief is denied;  
22 and (2) the Commissioner's decision is affirmed, and Judgment shall be  
23 entered in favor of defendant.  
24

25 DATE: February 16, 2010

/S/ ROSALYN M. CHAPMAN  
ROSALYN M. CHAPMAN  
UNITED STATES MAGISTRATE JUDGE